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No. _____

IN THE

Supreme Court of the United States

October Term, 1988

GRISWOLD INSTITUTE, INC., FREEDOM ACADEMY, NORBERT DENNERLL, JR. AND BEVERLY DENNERLL,
Petitioners,

vs.

UNITED STATES OF AMERICA,
Respondent. _____

PETITION FOR WRIT OF CERTIORARI
To the United States Court of Appeals
For the Sixth Circuit

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I.

QUESTIONS PRESENTED

1. May a district court, through the vehicle of alleged punishment for contempt, issue an injunction, the avowed purpose of which is to terminate the existence of a litigant for failure to comply with a previous injunction issued two (2) years prior thereto?

2. May the district court, through the vehicle of alleged punishment for contempt, issue an injunction, the avowed purpose of which is to correct past wrongs or to afford redress for wrongs already committed?

3. May a litigant, who secures an injunction unopposed by his opponent, and thereafter sleeps on his rights given him by said injunction, allowing his opponent to voluntarily and involuntarily avoid the injunction, come subsequently in to the court, pursuant to motion to show cause and obtain a new injunction to put his opponent out of business as a consequence of the violation of the previous injunction, acquiesced in by the parties?

II.

RULE 28.1 STATEMENT

Griswold Institute, Inc. is an Ohio corporation for profit having no subsidiaries whatever. Its sole business is the operation of Griswold High School in Cleveland, Ohio.

Freedom Academy is an Ohio nonprofit corporation having no subsidiaries whatever.

PARTIES BELOW

Griswold Institute, Inc.

Freedom Academy, Norbert Dennerll, Jr. and Beverly Dennerll, defendants, petitioners herein, and the United States of America, respondent.

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vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI
To the United States Court of Appeals
For the Sixth Circuit

Petitioners, Griswold Institute, Inc., Freedom Academy, Norbert G. Dennerll, Jr., and Beverly Dennerll respectfully pray that a writ of certiorari issue to review the judgment and decision of the United States Court of Appeals for the Sixth Circuit filed in these proceedings on January 27, 1989.

OPINIONS BELOW

This petition seeks review of a decision of the United States Court of Appeals for the Sixth Circuit which involves questions of due process under the Fourteenth Amendment to the Constitution of the United States occasioned by the claimed gross abuse of the power of the district court in issuing a mandatory preliminary injunction, the effect of which was to put petitioners out of business as a consequence of their voluntary and involuntary avoidance of a previous mandatory preliminary injunction. The claim by petitioners is that the district court grossly abused its power of injunction.

The opinion of the United States Court of Appeals for the Sixth Circuit was never written and has never been reported. The questions and oral opinions expressed by the court on hearing are included in the transcript attached hereto, reproduced in the Appendix at pages A1 to A15.

The orders of the United States District Court for the Northern District of Ohio, Eastern Division, Case No. C85-752 of July 23, 1985 and December 17, 1987 are printed in the Appendix at pages A20 to A22, and A16 to A19, respectively. No District Court opinions were written.

JURISDICTION

The judgment of the Sixth Circuit Court of Appeals was entered on December 13, 1988. Petitioners filed a timely Petition for Rehearing with Suggestion for Rehearing *en banc*. The Petition for Rehearing with Suggestion for Rehearing *en banc* was denied on January 27, 1989. The petition is timely filed within the time period granted by the Court. This court's jurisdiction is invoked under 28 U.S.C. Section 1254(1).

STATUTE INVOLVED

28 U.S.C.S. §1292. Interlocutory decisions. The text of this statute can be found in the Appendix at A26 to A28.

STATEMENT OF THE CASE

A. History of Prior Proceedings Between Petitioners and the District Court Judge

The district court judge is Frank J. Battisti. He is the selfsame judge who decided the Cleveland schools' desegregation case, *Reed v. Rhodes*, United States District Court for the Northern District of Ohio, Case No. C73-1300.

At about 1978 or 1979 the district court found that the Cleveland Board of Education had in fact engaged in discriminatory practices relative to assignment of pupils to the various schools operated by it, and he ordered, in order to overcome the neighborhood housing pattern, busing of students; those on the east side of Cleveland were to be bused to the west side; those on the west side were to be bused to the east side, often for distances of twelve (12) or more miles each way; often taking a one (1) hour ride each way on the bus. Prior to the implementation of said busing order a number of groups sprung up which were opposed to the order; so far as we know all of the groups engaged only in rhetoric. One of the groups formed was Citizens Opposed to Rearranging Kids, "CORK". Its president was Norbert Dennerll, Jr.

At about April 1980 Franklin B. Walter, Superintendent of Public Instruction, Ohio Department of Education, was on the witness stand in *Reed v. Rhodes*, and he was being cross-examined by local counsel for the NAACP. He was asked as to what would happen in the event that Mr. Dennerll should acquire ownership of the stock of Griswold Institute, a corporation incorporated in 1960 and holding a valid certificate from the Ohio Department of Education ever since February 1961, which certificate indicated that it

would remain in full force and effect until revoked, which is what the Ohio Statute, O.R.C. 3301.16 says shall be the tenure of high school charters. Without hesitation, Mr. Walter, who is not an attorney, indicated that if Mr. Dennerll should attempt to take over the school the charter would be "automatically canceled."

Accordingly, the following August Mr. Dennerll wrote first to the State Board of Education to inquire as to whether or not the charter was in fact in good standing. He then purchased the executory contract of another individual to purchase the corporate stock of Griswold Institute, Incorporated and commenced to do business. The Ohio Department of Education forthwith notified the Columbus, Ohio media that the charter was suspended, and the next day a letter was sent by the Ohio Department of Education so indicating. Thereafter the State of Ohio failed to pay auxiliary services funds, which the school needed for its survival, for a period of approximately six (6) years.

Auxiliary Services Funds are now being paid, and the school is now paying its Federal taxes.

On either May 6 or May 8, 1981 Judge Battisti, again in another hearing on *Reed v. Rhodes*, ordered that Mr. Dennerll, who was not represented in the case, and whom the district judge would not permit to be represented, appear as a witness. The judge indicated that Mr. Dennerll's group had previously hung him in effigy, and Mr. Dennerll, subsequently, on the stand, indicated that the judge had "lied". The judge made it abundantly clear that he opposed the very existence of Griswold Institute, and its companion elementary school, Freedom Academy, which Mr. Dennerll had formed. Thereafter, other than this case, there was no contact with Judge Battisti except that every time that Freedom

Academy applied for a charter and it was turned down the school would appeal to the Cuyahoga County Common Pleas Court, and the case would be removed by the State defendants to Federal Court where they would promptly file a motion for summary judgment, which judgment Judge Battisti always granted, so that this school received no auxiliary services funds, either, for a period of perhaps five (5) years after it first applied for a charter.

B. Statement of the Facts Regarding this Case

This case was filed on March 15, 1985 by respondent, United States of America, as a civil action by the respondent to "reduce to judgment certain assessments of tax, penalties and interest made against Griswold Institute, Inc. and Freedom Academy, two (2) Ohio corporations." Respondent has made it rather clear that respondent is, however, not interested in pursuing the alleged principal remedy sought in the lawsuit. Rather, respondent sought to pursue, as ancillary relief, the request that the Court "restrain and enjoin the corporate defendants together with their officers, agents, and employees, specifically defendants Norbert G. Dennerll, Jr. and Beverly Dennerll, from (a) failing to pay timely *future withholding and Federal Insurance Contributions Act (FICA) tax liabilities,* (b) transferring money or property to any nonparty for the purpose of having that party pay the salaries or wages of any of the employees of Griswold Institute, Inc. or Freedom Academy; and (c) . . . making any disbursements until the amounts required to be withheld from *future wages and salaries* of their employees are first paid by cash or certified or cashier's check to the Internal Revenue Service." (emphasis ours.)

On July 23, 1985 without objection from the petitioners, the court granted the motion for preliminary injunction, which preliminary injunction ordered respondents to not pay any future salaries and other expenses unless they *contemporaneously paid current taxes.*

Petitioners made attempts to comply with the foregoing injunction but eventually fell behind. Due to the failure to receive State of Ohio auxiliary services funds, previously indicated, they failed to pay other creditors who attached liens, actually on one occasion caused petitioner Norbert G. Dennerll to be incarcerated for contempt of court for failure to pay a state court order, effectively collected State of Ohio Employment Taxes, etc.

After it slept on its rights, with no attempt at levy, attachment, or any of the other remedies granted to it in the original restraining order, the respondent Government came in in late 1987 with a "Motion to Show Cause."

At the hearing on the motion to show cause the district collector submitted some figures relative to alleged tax liability, which figures appellants had no opportunity to contest, and counsel for the respondent produced answers to interrogatories verifying the fact that payments to other creditors, including this attorney, and including the litigant who had Mr. Dennerll incarcerated, had been paid. Respondent herein made it abundantly clear to the District Judge that it wanted the two (2) schools shut down by the court.

The means or manner in which the Government, respondent herein, sought to accomplish its aim was by the vehicle of a finding in contempt wherein, as the

penalty for said finding, the court would enact another new temporary restraining order restraining the petitioners from paying any current expenses *unless the petitioner paid all past due taxes which the respondent said were due ever since the order of July 23, 1985.* It was admitted that petitioners could not raise the necessary money to pay all of these accrued taxes.

Petitioners moved for a stay of the order, and the district court refused to grant same, claiming that his order was not an appealable order and that the Court of Appeals would promptly so determine. Respondent filed a motion to dismiss with the Court of Appeals, claiming the selfsame thing that the District Judge had, that the order was only a finding in contempt without the imposition of a jail sentence and therefore unappealable. The Court of Appeals *ruled against* the motion to dismiss based on said reasoning, and held that the order conclusively was, on its face, a *temporary restraining order* and was in fact an appealable order. It also granted a stay conditioned upon petitioners paying all current taxes and certain accrued taxes, nothing near the magnitude of accruals mandated by the order of the District Court, however.

C. Court of Appeals Proceedings

As indicated, on appeal to the Court of Appeals respondent moved for dismissal on the grounds that the order appealed from was not an appealable order, and petitioners, for their part, moved for a stay of proceedings. The Court of Appeals of the Sixth Circuit ruled in favor of petitioners as to both of the foregoing. Hearing in the Court of Appeals is set forth in full in the very brief transcript attached hereto. The District Judge, Johnstone, sitting by assignment, never uttered a sound

during the hearing on this case or the three (3) preceding cases. This is why the transcriber of the testimony left his name off. To the best of our knowledge and belief none of the judges on the circuit court ever had any contact with, or knowledge of, these petitioners. Note that Judge Guy apparently was unaware of the previous order of the Sixth Circuit finding this to be an appealable order (A7, A10).

Judge Merritt, for his part, upon being advised that the appeal was brought pursuant to 28 U.S.C.S. Section 1292 "Interlocutory decisions," indicated, "*We don't honor those kind of appeals.*" (A13). Other than the foregoing, we can only state that the transcript speaks for itself.

WHY THE WRIT SHOULD BE GRANTED

1-2. A District Court, Through the Vehicle of Alleged Punishment for Contempt, Grossly Abuses Its Discretion When It Issues an Injunction, the Avowed Purpose of Which Is to Terminate the Existence of a Litigant for Failure to Comply With a Previous Injunction Issued Two (2) Years Prior Thereto. The Issuing of an Injunction, the Purpose of Which Is to put a Litigant Out of Business, Terminating His Economic Existence, Is a Violation of Due Process Under the Fourteenth Amendment to the United States Constitution.

It is to be noted that the original order of July 23, 1985 ordering petitioners not to pay other creditors unless they first pay the Internal Revenue Service was *never contested by petitioners.* Petitioners agreed in writing, in fact to comply with that order. Thereafter, petitioners filed a motion with the District Court asking that court to include the other judgment creditors of petitioners as defendants in that court so that the court could prevent attachments of the funds of petitioners, which attachments caused petitioners to be involuntarily unable to comply with the prior order of court. *That motion was opposed by respondent, and the court refused to grant that motion,* indicating that it did not wish to preside as "caretaker" over petitioners' finances.

Bailiffs of the Cleveland Municipal Court indicated that the Federal order had no effect on them, and they proceeded with their attachments, etc.

Respondent permitted petitioners to fall farther and farther in arrears, never paying any of their monthly taxes when due, for a period in excess of two (2) years.

Thereafter, having slept on their rights given to them in the original order, they came back into court with a Motion to Show Cause why petitioners Dennerll should not be punished for contempt. Upon the finding of contempt, they then filed a *proposed new injunction* attempting to force petitioners to either pay the taxes they had failed to pay for the past two (2) years or else be put out of business.

To the proposed entry, counsel for petitioners proposed a different entry, one which would divide petitioners' creditors and tax liabilities into two (2) groups, those which were currently due and would be due in the future being the first group, and those which were past due and accrued falling into the second group. Under his proposed entry the taxpayers would be prevented from paying any current and future obligations unless current and future taxes should contemporaneously be paid, and, on the other hand, taxpayers would be prevented and precluded from paying any past due obligations unless a payment of equal amount should be made on their taxes previously due the respondent.

Petitioners' proposed entry was rejected by the court. The court signed the order proposed by respondent, which is the order herein appealed from. It will be noted that the purpose of the current "injunction" is not only to defer petitioners from engaging in prohibited acts, the payment of other obligations, including teachers' salaries, without contemporaneously paying taxes, *but also to punish petitioners for their past conduct.* The function of this injunction is not limited to affording preventive relief; the function of this injunction is *to correct wrongs or injuries already committed,* the non-payment of taxes for

the preceding two (2) years, the punishment being to force petitioners out of business. By the vehicle of filing a Motion to Show Cause why petitioners should not be punished for contempt, and hearing on that motion, wherein respondent presented minimal evidence that petitioners had failed to pay taxes while contemporaneously paying other creditors, whether said payments were voluntary or involuntary, respondent then put on a new injunction, the order now appealed from, the function of that injunction being *to afford redress for wrongs already allegedly suffered by respondent.*

Respondent claims that this new injunction with antecedent provisions requiring the litigant to comply with the old injunction, which he has avoided with impunity during the past two (2) years is a legal means of correcting the avoidance and violation of the old injunction.

In the case of *Holland v. Amoskeag Mach Co.*, 44 F. Supp. 884 (D.C. New Hampshire), it is stated that the purpose of an injunction is *not to punish a litigant for past conduct.* We note the case of *City of Alma v. Loehr*, 22 P. 424 (1889), wherein the court said the following:

> "The function of a writ of injunction is to afford preventive relief. It is powerless to correct wrongs or injuries already committed. This is alphabetical law."

In the case of *Walling v. Todd*, 52 F. Supp. 62 (D.C. Pa.), the court said on page 65 the following:

> "The purpose of an injunction is to deter a defendant from engaging in prohibited acts, and not to punish him for past conduct. *Fleming,*

Administrator of Wage and Hour Division, Department of Labor v. National Bank of Commerce of Charleston, (D.C.), 41 F. Supp. 833."

In the case of *Society for Establishing Youthful Manufacturers v. Morris Canal and Banking Company,* 1 N.J. Eq. Saxt. 157, 21 Am. Dec. 41, it was held that the province of an injunction is not to afford remedy for what is past, but to prevent future mischief. Hence past injuries are in themselves no grounds for an injunction.

In *Comer v. Woods,* 195 S.W.2d 542, on page 544, the court said the following:

> "In 28 American Jurisprudence, page 199, Section 5, the text writer says: 'Injunction is primarily a preventive remedy. Its province is to afford relief against future acts which are against equity and good conscience, and to keep or preserve a thing in status quo, rather than to remedy what is past or to punish for wrongful acts already committed. Generally speaking, rights already lost and wrongs already perpetrated cannot be corrected by injunction.' In support of the text is cited the case of *White v. Sparkill Realty Corp.,* 280 U.S. 500, 50 S. Ct. 186, 74 L. Ed. 578. In that case, the Supreme Court of the United States quoted with approval from *Lucassagne v. Chapuis,* 144 U.S. 119, 124, 12 S. Ct. 659, 661, 36 L.Ed. 368, 370."

3. A Litigant, Who Secures an Injunction Unopposed by His Opponent and Thereafter Sleeps on His Rights Given Him By Said Injunction, Allowing His Opponent to Voluntarily and Involuntarily Avoid the Injunction Should Not Be Able to Come In to the Court Pursuant to Motion to Show Cause and Obtain a New Mandatory Injunction to Put His Opponent Out of Business as a Consequence of the Violations of the Previous Injunction, Acquiesced in by the Parties.

The case of *Lacassagne v. Chapius*, 144 U.S. 119, 124, 12 S. Ct. 659, 661, 36 L. Ed. 368, 370 is cited with approval in the 1900 case of *Black v. Jackson*, 177 U.S. 350, 361, and in a case which arose in the Sixth Circuit, *McFarland Co. v. O'Brien*, 6 F.2d 1016, 1018 (D.C.N.D. Ohio 1925).

It is to be noted that the order of court herein appealed from is a mandatory preliminary injunction.

The case of *McMullan v. Wohlgemuth*, 281 A.2d 836, 841 (Pa. Sup. Ct. 1971) says:

> "Mandatory preliminary injunctions should be granted even more sparingly than those which are merely prohibitory. A preliminary injunction is generally simply preventive, maintaining the status quo until the rights of the parties are determined after a full examination and hearing."

The 1979 case of *Dereberry v. Two-Way Water Supply Corp.*, 590 S.W.2d 647 (Tex. Civ. App.) reads:

> "A temporary mandatory injunction changes the status quo and should be granted only in cases of extreme hardship. *Haynie v. General Leasing Co., Inc.*, 538 S.W.2d 244 (Tex. Civ. App. Dallas 1976, no writ); *Arvin Harrell Co. v. Southwestern Bell Telephone Co.*, 385 S.W. 2d 696 (Tex. Civ. App. Austin 1964, no writ)."

See *Steggles v. National Discount Corp.*, 39 N.W.2d 237, 15 A.L.R.2d 208 (1949):

> "Mandatory injunctions are seldom granted prior to the hearing of the case and then only in the most exceptional cases when required to preserve the status quo."

Hume v. Zuehl, 119 S.W.2d 905 (Tex. Civ. App. 1938), dealt with a tax collection contract. The court held that the granting of the injunction would accomplish the main purpose of the suit before it ever came to be tried on the merits, and the injunction was accordingly refused.

Rader v. Burton, 130 N.E.2d 58, 61 (Ind. App. 1955), says:

> "When a court is asked to compel the undoing of something that has been done it is a familiar principle that the court will balance the equities between the parties and consider the benefit to the plaintiff of a mandatory writ as against the inconvenience, expense and damage to the defendant and award relief accordingly."

In 42 Am. Jur. 2d, *Injunctions*, Sec. 20, Pg. 752, we read the following:

> "The facts which will warrant mandatory relief must be clear, be free from reasonable doubt, and disclose the prospect of irreparable injury to the complainant. Equity will not interfere where the anticipated injury is doubtful or speculative; reasonable probability of irreparable injury must be shown. Such relief will be refused where the injury is so slight as to bring the case within the maxim "de minimis non curat lex," where there is no appreciable damage, where a mandatory decree would require a difficult and expensive act, or where its enforcement would necessitate close and continuous supervision by the court for an indefinite

> period. As in other cases of injunction, the court will balance the equities between the parties and consider the benefit to the plaintiff of a mandatory writ as against the inconvenience and damage to the defendant, and award relief accordingly."

This injunction says that the taxpayer must undo that which it has already done. It says:

> "Do not maintain the present status quo but restore the status quo to two and one half (2 1/2) years ago before you voluntarily or involuntarily violated the court's prior order."

We are unable to determine the "extreme hardship" which the respondent government suffered as a consequence of failing to have an order shutting down the schools for failure to pay taxes which accrued two and one half (2 1/2) years before. As a matter of fact, if the schools are shut down, how can respondent be paid the accrued taxes? What is the *extreme hardship* entitling respondent to this injunction?

If the nonpayment of these taxes during the years of 1985 through 1987 caused the respondent such "hardship", why did the respondent not attempt to levy, to collect its taxes as did the State of Ohio?

We do not believe that the changing of the status quo by the shutting down, the economic capital punishment, of a litigant is the function of a mandatory temporary injunction. It is our opinion that the following cases support this view:

Blaylock v. Checker Oil Company, 547 F.2d 962, 965 (1976);

Reed v. Cleveland Board of Education, 581 F.2d 570 (1978);

Socony-Vacuum Oil Company v. Oil City Refiners, 136 F.2d 470, 475 (1943);

Stenberg v. Checker Oil Company, 573 F.2d 921 (1978).

SUPREME COURT CASES AS FOLLOWS:

Gardner v. Westinghouse Broadcasting Co., 437 U.S. 478, 481, n.7, 98 S. Ct. 2451, 2453 n.7, 57 L. Ed. 2d 364 (1978);

Lacassagne v. Chapius, 144 U.S. 119, 124, 12 S. Ct. 659, 661, 36 L. Ed. 368, 370;

Black v. Jackson, 177 U.S. 350, 361;

United States v. Collahan, 635 F.2d 564, *cert. denied*, 454 U.S. 831, 70 L. Ed. 2d 108, 102 S. Ct. 127 (1980).

It will be noted that the respondent, the government, still had all of the rights granted to it under the original order of court of 1985, and, in addition, they of course still had their pending case wherein they allegedly sought judgment. It is obvious that this is not what the respondent wanted; respondent wanted to put petitioners out of business, which obviously would cause it to be impossible for them to comply with the prior order of court.

An injunction is a preventive remedy only, and cannot be invoked to restrain a party from doing an act which he has already done. In such a case the party injured must be remitted to his remedy at law, which is in every respect competent to afford adequate relief. *Kahn v. Old Telegraph Mining Co.*, 2 Utah 13-18; *Wangelin v. Goe*, 50 Ill. 459, 463.

"Injunction" is substantially a preventive remedy designed to guard against future injury rather than to afford redress for wrongs already suffered. *City of Cleveland v. Division 268 of Amalgamated Ass'n. of St. Elec. Ry. & Motor Coach Emp. of America*, 81 N.E.2d 310, 312, 84 Ohio App. 43.

"Injunction" is primarily a preventive remedy intended to afford relief against future acts or conduct which are against equity and good conscience, and to preserve and keep a thing in status quo rather than to remedy what is past and done or to punish for wrongs already committed. *Devine v. Devine*, 90 A.2d 126, 128, 20 N.J. Super. 522 (N.J. Super. Ct.).

CONCLUSION

It appears obvious that the trial court's views relative to the necessity of busing to achieve integration differed from those of petitioner Norbert Dennerll, Jr., who personally does not believe in busing children, disrupting the neighborhood school pattern, in order to achieve integration. This does not mean that he is *opposed to integration;* his schools have different races in attendance, and he has had Negro teachers and other Negro employees on his staff. We believe that a litigant ought to have a day in court, that every citizen, regardless of whether or not his views may differ from those of a federal judge who has ordered busing of students to achieve integration is entitled to due process, equal protection of the laws, and the same protection of his property rights as those who are similarly situated. This, in our opinion, does not mean that a litigant should be out of business by the vehicle of issuing a mandatory temporary injunction with which he cannot possibly comply.

In the case of *Sexton v. Barry*, 233 F.2d 220 (6th Cir. 1956), the court said on page 224 the following:

> "Due process is 'a law which hears before it condemns; which proceeds upon inquiry, and renders judgment only after trial.' *Trustees of Dartmouth College v. Woodward*, 4 Wheat. 518, 4 L.Ed. 629."

Nor do we believe that the Sixth Circuit afforded due process to his counsel.

For the foregoing reasons a writ of certiorari should issue to review the judgment and opinion of the Court of Appeals for the Sixth Circuit.

Respectfully submitted,

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APPENDIX

ORAL OPINION AND TRANSCRIPT OF THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

(December 7, 1988)

Case No. 88-3022

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

GRISWOLD INSTITUTE, INC., *et al.*,
Defendants-Appellants.

TRANSCRIPT OF PROCEEDINGS BEFORE
THE HONORABLE GILBERT S. MERRITT
AND HONORABLE RALPH B. GUY

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For the Defendants-Appellants:

U.S. Department of Justice
Washington, D.C.
By: Calvin Curtis, Esq.

[2] PROCEEDINGS

MR. BLAKE: Good afternoon, your Honors. I'm Bill Blake from Cleveland and I'm representing the appellants. May it please the Court, we feel this is a clear abuse of the power of a District Court to grant a mandatory preliminary injunction.

This injunction was granted pursuant to a motion filed by the government to show cause. And I think that the joint appendix, page 64, it's record page 29, line 18, wherein counsel for the government says—"I don't feel that we have the power to close them down, per se, or ask the Court to close them down, per se." And the reply of the Court, "Well, I don't know why not." Says a volume. We might point out that initially we filed a motion—

JUDGE MERRITT: Why don't we talk about what the issue in the case is.

MR. BLAKE: Okay. The issue is the abuse of the power of mandatory preliminary injunction. It's to punish the appellants by putting them out of business. Secondly, it's to turn the clock back two and a half years and say, "you should pay this money that we ordered you to pay back in—we're turning it back to—"

JUDGE MERRITT: Well, that's all they did. [3] He issued one injunction that was not appealed from two years beforehand.

MR. BLAKE: Right, and not enforced either.

JUDGE MERRITT: Well, he issued the injunction and the defendants in the case filed a letter in which they said—Where is that?

MR. BLAKE: They acknowledged receipt.

JUDGE MERRITT: They say that they were going to comply with it.

MR. BLAKE: Yes, that's right.

JUDGE MERRITT: That is on—Well, I don't have the page number. Ninety-three it looks like. By Darnel—

MR. BLAKE: Dennerll.

JUDGE MERRITT: —And they say that they're going to comply, and they recite what it is they're going to comply with August 1, 1985. And then they just didn't comply with it.

MR. BLAKE: Okay. What I had proposed by way of entry following this December '87 hearing, which is two and a half years later, was an entry similar to the '85 one dividing the creditors into two categories and the taxes into two categories also. First present and future taxes under which they would have to pay the [4] present and future taxes, and not pay any other current creditors.

Secondly, the accrued taxes, and further provide that they would not pay any other creditors, any accrued creditors, or old creditors. If you please, old business, new business, without paying the government a like amount, which would have in effect reinstated the order of July 23rd, 1985. What they did here is, let it go from '85 to '87 without attempt to enforce it and then order this—

JUDGE MERRITT: Who let it go?

MR. BLAKE: The government.

JUDGE MERRITT: Well, what do they got to do? They got to come out here every week or every month and collect their money?

MR. BLAKE: Other creditors levied on desks and things and the school got together money or they'd lose their desks. It seems to me they could have done something. They could have gone into the District Court earlier than letting two and a half years go by. What they did, they let two and a half years go by to the point where they knew that the school could not possibly come up with the money. Everyone agreed with this. Then—

JUDGE MERRITT: Well, the fact of the [5] matter is, that the schools simply defied the court order.

MR. BLAKE: No, that isn't—

JUDGE MERRITT: Why not? They didn't pay the withholding tax after the injunction was entered.

MR. BLAKE: They paid some taxes, but there were many cases where they didn't defy. They had other creditors. They had classrooms being conducted in these trailers. They fell behind in their rent on the trailers. Those people got a court order. Mr. Dennerll agreed to make the payments; when he didn't make the payments they got him found in contempt of court and put in county jail.

JUDGE MERRITT: What kind of schools are these? Who are their students?

MR. BLAKE: Okay. It's Griswold High School is a general high school. It was formed by George Griswold. I think he died last year in Florida at age 97. About 50 or 60 years ago he formed the high school. Then in 1960 he incorporated it. It's the only high school incorporated for profit in the State of Ohio. It's incorporated for profit for some reason. Then in 1961, February of '61—

JUDGE MERRITT: How many students do they have?

MR. BLAKE: They have about 150 in the [6] high school, I think, and 150 in Freedom Elementary. Dealing with about 300 students.

JUDGE MERRITT: What's the tuition?

MR. BLAKE: Beg your pardon?

JUDGE MERRITT: What's the tuition?

MR. BLAKE: I think around 1350 a year, something like that.

JUDGE MERRITT: Not high enough to make a profit.

MR. BLAKE: That's it, not high enough to cover expenses without help from the State of Ohio. Interestingly enough, this same district judge believed that these people had hung him in effigy in *Reed vs. Rhodes*, which has been up to this court a couple of times. He brought in the school—they weren't a defendant. He put Mr. Dennerll on the stand, and Mr. Dennerll denied that he had ever—neither he or any of his students had anything to do with hanging Judge Battisti in effigy over the Cleveland bussing situation.

The Judge put on an order telling the State of Ohio they weren't to charter either of these schools until approval by the District Court. Well, Griswold didn't need a charter, they'd had one for 20 years then, in excess of 20 years. But the state quit giving them their auxilliary services funds. They wouldn't charter [7] Freedom. We carried through with our appeal procedure. Every time we'd file in State Court they'd remand it to Federal Court, and the Judge threw the thing out on a motion for summary judgment twice. So there was about $150,000 that Freedom would have had. They would have been current with IRS had the Judge allowed the State to give them their auxiliary services funds.

And I understand that, since this action has been filed, I understand, both from the Dennerlls and from the government representative, that they have been faithfully and religiously paying taxes. And the reason is, that now the State of Ohio is giving them their auxiliary services funds. So if the government's goal was to see that the taxes would be paid currently as they fell due as of back on July—

JUDGE MERRITT: Why do we have this appeal then? If they're paying their taxes, why haven't they paid them? I mean, why have we got this appeal?

MR. BLAKE: They can't pay the accrued back to '85. There's no way.

JUDGE MERRITT: How much is that?

MR. BLAKE: It's about 200—I think 285,000, something like that.

JUDGE MERRITT: How much of that's actual taxes and how much of it is penalty and interest?

[8] MR. BLAKE: Probably 50/50. This is an interesting thing about these. Now, these taxes are due quarterly. For instance, January, February, March, it's due by April 15th. They've got them, for some reason, on a monthly reporting system, so that for instance, the taxes that would come due for the month of January; If they pay them by February 16th they get hit with a penalty of five percent penalty for late payment, or not late payment but late filing. And really the filing and the payment aren't due until the end of the quarter, 15 days into the next quarter. So I think that a lot of these penalties are suspect; they are to me; and the interest. But the way that was presented to the Court is as shown in the record. The man came in with his figures, said

here are the taxes, here's the penalties, and that was it. The Court asked him if he knew under what section of the Internal Revenue Regulations he assessed the penalty, he said he didn't, and the Court still took those figures as being it.

JUDGE MERRITT: All right. Well, I think we understand your position, counsel. We'll give you a couple of minutes for rebuttal. Do you have anything else you want to say to us?

MR. BLAKE: Well, I think that basically—yeah. One thing. Now, this came as I've indicated, [9] on a motion to show cause. The Court put his order on and we all know what his order is. There's no question but that it's a mandatory preliminary injunction.

JUDGE GUY: You say that, but I'm not sure it's that clear to me. It's an order to show cause why you shouldn't be held in contempt—

MR. BLAKE: No. What they've done—It's much more than that. If it were that—

JUDGE GUY: Well, that's the way the order starts, I've got it right in front of me here.

MR. BLAKE: The preamble may read that way, your Honor, but the rest of it doesn't—In fact, that's been adjudicated by this court. We sought to appeal it, or first, when we indicated we were appealing we filed a motion to stay with the District Court. The District Court indicated the same thing as your Honor has, in essence, that it's merely a finding in contempt without jailing anyone. It's not going to be an appealable order, he said, and, therefore, he's not going to grant a stay. So it came before this court and the first thing the government did, logically enough, is to attempt to have the case dismissed on the basis that it wasn't an appealable order.

This court, in examining the order, said it's clearly a preliminary injunction, clearly appealable [10] under the Preliminary Injunction Act, which we attached here, the section. It clearly belongs in this court. It tells them, and it's a mandatory preliminary injunction. It says—it doesn't—now, the original order—Let me say this. Back as of July 23rd, '85, these schools both owed back taxes, they weren't current as of that instant. They were behind, that's why the government filed the case.

On July 23rd, '85, they got the order. This didn't mention any accrued taxes, anything in the past. It clearly sought to keep the parties in status quo, as far as I can see, and was a proper preliminary injunction. It said, don't pay any teacher's salaries. Don't pay for books. Don't pay for rent. Don't pay anybody unless concurrently with paying the salaries you pay your taxes. I don't see anything wrong with that.

All right. What happened? They slept on that order for two and a half years. They waited. They came up with this new order, instead of putting the creditors into two categories, as I proposed, which would have reinstated the order as of '87, saying, do that, don't pay any current creditors unless you pay your taxes, and I was going further and saying, don't pay any past creditors unless you put a like amount on your past taxes. That isn't what the government wanted. The [11] government wanted to put them out of business. They say so in appendix page—

JUDGE MERRITT: You agree that all these taxes are owed?

MR. BLAKE: I don't know. No, I don't agree, your Honor. We don't really have any—I know there's substantial taxes that are owed. As to the amounts, I couldn't—

JUDGE MERRITT: You agree that the school didn't comply with the first order?

MR. BLAKE: They didn't comply—

JUDGE MERRITT: All we have before us is another order or injunction which puts a little tighter screws on the school.

MR. BLAKE: I think it seeks to punish them for not complying with the other order.

JUDGE MERRITT: To make them comply with the injunction that was issued before.

MR. BLAKE: It seeks to punish the—

JUDGE MERRITT: What's your theory that—What's your legal theory on appeal that this injunction is bad and that it should be reversed and set aside?

MR. BLAKE: It seeks to punish them. It seeks to punish them, not to maintain the status quo. Now, we've never quarreled with the first order. The [12] first order maintained the status quo. This order is attempting to do one of two things or both. First, it says, turn the clock back two and a half years. Restore the status quo; put us back where we were two and a half years ago. You can't do that with the Government Treasury or the Treasury of the United States. You can't do it with this school.

JUDGE MERRITT: That's the legal theory? What is the legal theory?

MR. BLAKE: Yes, yes.

JUDGE MERRITT: What you say as an answer to my question, what is your concept or what is your legal theory, is that the—is simply to recite what you consider

to be the fact that the injunction requires them to pay some taxes and that that'll put them out of business and that punishes them. Is that a legal theory?

MR. BLAKE: No, no, it isn't. If they could pay the taxes it wouldn't put them out of business, let me say that. The fact is, everybody knows they can't pay the taxes. The order says go out of business. Don't pay your rent. Don't pay your utilities. Don't pay your teachers. I'm not talking about the order of '85; there was nothing wrong with that order, as far as I'm concerned. I'm talking about the last order here, which [13] is to punish them, which is to turn back the clock; and I've cited a number of cases here which says, the injunction is to preserve the status quo. In fact, my letter said mandatory preliminary injunction should be granted even more sparingly than those which are merely prohibitory.

A preliminary injunction is generally simply preventive. In other words, don't pyramid your taxes, which is what the one in '85 said. And I don't see anything wrong with that. I don't see anything wrong with the order.

JUDGE MERRITT: Okay, that's enough. We'll give you a couple minutes to rebuttal. Counsel.

MR. CURTIS: May it please the Court, good morning. My name is Calvin Curtis representing the United States here. The Court's obviously familiar with the issue. It's familiar with the facts.

JUDGE MERRITT: Why wasn't this brought as a regular tax case instead of seeking an injunction? Why didn't you proceed under the Internal Revenue Code, to levy and assess, levy, and enforce.

MR. CURTIS: Well, there are two answers to that, your Honor. The first one is the levies weren't effective. In effect, we did attempt to do that exhaustively to the point of assessing the responsible [14] office for penalties against the Dennerlls. We did everything in our power to do so. The revenue agent determined that the schools were operating in rented buildings. Had no appreciable assets other than these books and desks. That their value was not in excess of $1,000. The Dennerlls had no assets. So we needed an injunction to stop the bleeding, so to speak.

Counsel's argument seems to be that somehow the District Court errored when they failed to comply, with the original injunction. Had they done so, had they paid over these amounts to the United States, we wouldn't be here today. But they did fail to comply, and so the United States was faced with a situation where taxes were continuing to accrue and something had to be done, as I've indicated, to stop the bleeding.

Just three quick responses. Counsel's argued that the United States somehow sat on its rights for two and a half years, and that somehow that's prejudiced them or the court or something to that effect. That's simply not true. The initial order was entered in July of 1985. Thereafter, tax payers did comply for a period of anywhere from six to nine months with that order. That took us to the spring of '86. Then they failed to comply. At that point, once the IRS had determined that they were failing to comply, shortly thereafter, the [15] United States sent interrogatories to opposing counsel requesting specific information, bank accounts, employee names and addresses, payments to employees and creditors, sources of income, amount of taxes due.

The defendants didn't answer these interrogatories until the spring of 1987. Thereafter, the United States moved to have them held in contempt.

JUDGE GUY: What's your construction of the document that came out after the contempt to show cause in the contempt? Do you concede that that's an injunction?

MR. CURTIS: Your Honor, that, as Mr. Blake pointed out, that has been considered by this Court, and we're in accordance with that court's ruling. It was simply designed to coerce or to try and get these defendants to comply with the original order.

I think two other things that need to be mentioned. The first is the nature of these funds. These funds aren't the individual liabilities of these corporations. They're amounts that are required to be paid over to the government. They're the government's money. Just as if I were to give a $100 bill to Mr. Blake and ask him to hold it for me. It's not his money. It's not his money to do with as he pleases to pay his creditors. If there's any kind of dispute between the [16] Electric Company and the United States, clearly, it's the United States' money. So it's important to keep that distinction plain. Finally—

JUDGE MERRITT: The statute says it'll be held in trust, right?

MR. CURTIS: That's correct, your Honor. These are trust fund monies. The United States wants these monies, are lost by these employers if they're used to pay, the United States can't collect them again. The employees are given credits.

Finally, Mr. Blake's—what he appears to want this court to do, is to give them another fresh start. His proposal was pay current funds over to the government when current funds are paid. That's exactly what was done in 1985. They're not entitled to a fresh start. They've demonstrated that they can't pay these taxes over. The United States has tried to be sensitive to the school—

JUDGE MERRITT: Maybe he should have filed a Chapter 11 like Texaco.

MR. CURTIS: That's certainly a remedy available to them. The United States has tried to be sensitive. It realizes the parents have paid these monies over. It realizes the children need to be educated. It didn't want to push them out into the [17] public schools, it was concerned about that, but the times come. And if they can't meet their tax obligations they shouldn't be in business.

Unless there are any further questions, let me simply conclude by stating that the order of the District Court is correct and that it should be affirmed here. Thank you.

JUDGE MERRITT: All right. Anything further, counsel?

MR. BLAKE: Yes. If it please the Court as per page 75 of the joint appendix, the basis of the appeal is 28 USC, Section 1292, Interlocutory Decisions A-1, Interlocutory Orders,"—

JUDGE MERRITT: We know about that.

MR. BLAKE: Okay.

JUDGE MERRITT: We don't honor those kind of appeals.

MR. BLAKE: In my reply brief I cited a whole slew of cases. One that says, injunction is preventative remedy intended to afford relief against future acts. Let me say this first, that if counsel's intent was to force the school to finally pay their current taxes as they fell due, this order has done that. The school has ever since the appeal started and during the entire pendency of this appeal, paid the current [18] taxes.

The problem is, if he had that intent he should have done that within six months maybe after the 1985 order when it appeared that they weren't, come in then with a motion to show cause, not wait until the arrearage did pyramid, which is the very thing that the order was intended to prevent. And then, then after it's pyramided to where it's insurmountable, attempt to put on an order reversing the status quo backing things up to 1985. You can't back things up to '85. I have nothing against maintaining the status quo. We're maintaining the status quo now. They're getting their money every time. There's no teacher getting paid without the government getting its money. This school has to pay every month, where as the normal taxpayer has 90 days in which to pay these taxes in. They're paying them in every month. They're paying them faithfully and religiously. What I am saying is that—

JUDGE MERRITT: We understand what you're saying and this is rebuttal, Counsel. Is there anything you want to say in response to what he said? You said all of this several times.

MR. BLAKE: Thank you, your Honor. What I would say in rebuttal is, he says that these are trust funds, that may be true. That doesn't have anything to [19] do with the abuse of the injunction which is—They're using an injunction to punish these people. They didn't put on an order following the motion to show cause ordering a jail term, ordering anything—

JUDGE MERRITT: That's enough. You said that.

MR. BLAKE: That's it exactly.

JUDGE MERRITT: The Court is going to rule from the bench affirming the judgment of the District Court.

ORDER OF THE UNITED STATES DISTRICT COURT

(Dated December 17, 1987)

Civil Action No. C-85-752

IN THE UNITED STATES DISTRCT COURT
FOR THE NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

UNITED STATES OF AMERICA,
Plaintiff,

v.

GRISWOLD INSTITUTE, INC., FREEDOM ACADEMY, NORBERT G. DENNERLL, JR. and BEVERLY DENNERLL,
Defendants.

ORDER

This matter came before the Court on December 7, 1987 on plaintiff's application for an order to show cause why the defendants should not be held in contempt or for alternative relief. The United States and the defendants were each represented by counsel and Norbert Dennerll and Beverly Dennerll appeared in person.

The United States contended that the defendants had failed to comply with the terms of the preliminary injunction issued by this Court on July 23, 1985. Specifically, the United States alleged that Freedom Academy and Griswold Institute, Inc. two private

schools located at 600 Memphis Avenue in Cleveland, Ohio had failed to pay the withholding taxes[1] which this Court ordered them to pay. The United States also asserted that Griswold Institute Inc. and Freedom Academy had paid other creditors instead of the Internal Revenue Service of the United States, in violation of the terms of the preliminary injunction.

The Court heard testimony from Wayne Wilson, a Revenue Officer employed by the Internal Revenue Service and examined records presented by the United States relating to the failure of the defendants to pay withholding taxes and showing the payment of other creditors while the withholding taxes were due and owing. After considering the evidence and listening to counsel, the Court makes the following findings:

1. This Court issued a preliminary injunction on July 23, 1985 directing the defendant private schools to pay timely all withholding tax obligations accruing after that date. The defendants Norbert and Beverly Dennerll received a copy of this order and stated they would comply with its terms.

2. Despite the terms of the injunction, both defendants have failed to pay fully the withholding tax obligations coming due after the date of the injunction. Freedom Academy owed $46,799.30 in withholding taxes, interest and penalties as of December 7, 1987 for the last two quarters of 1975, the first four quarters of 1986 and all of 1987 up to December 7, 1987. Griswold Institute, Inc. owed $107,037.96 in withholding tax, interest and penalties for the same period. The penalties applicable

[1] The term as used herein refers to the income and Federal Insurance Contributions Act taxes required to be withheld from wages paid under Sections 3102 and 3402 of the Internal Revenue Code (26 U.S.C.).

are for failure to file timely the Federal Employer's Withholding Tax Returns and failure to pay withholding taxes which are imposed under Sections 6651(a)(1) and 6651(a)(2) of the Internal Revenue Code (Title 26 U.S. Code).

3. The defendants have paid other creditors while the withholding tax obligation due the United States were unpaid. Checks and cash belonging to Freedom Academy and totalling $57,672.48 were paid to other creditors for the period beginning July 23, 1985 through December 31, 1986. Checks and cash belonging to Griswold Institute, Inc. were paid to other creditors in the total amount of $45,670.62 for the same period.

The Court therefore ORDERS Freedom Academy and Griswold Institute, Inc. together with Norbert G. and Beverly Dennerll:

(A) Not to pay any creditors of either Freedom Academy or Griswold Institute, Inc. with funds belonging to or in which either defendant has any interest until the withholding tax obligations of these two defendants coming due after July 23, 1985 have been paid in full;

(B) To file monthly employer's quarterly withholding tax returns for Freedom Academy and Griswold Institute, Inc. with the Internal Revenue Service by the 15th of each month by delivering each return to Revenue Officer Wayne Wilson at the offices of the Internal Revenue Service Collection Division, 1240 East Ninth Street, Room 429, Cleveland, Ohio 44199;

(C) That Norbert and Beverly Dennerll shall file on or before the fifth business day of each month that the withholding tax obligations set forth above remain unpaid and beginning with January, 1988, an affidavit

stating that they have complied with this order and that no other creditors of Freedom Academy or Griswold Institute, Inc. have been paid.

(D) That a copy of this order shall be served personally upon Norbert and Beverly Dennerll and mailed to each of the creditors whose names have been furnished to the United States in defendants' response to interrogatory no. 4; and

Any violation of this order when brought to the Court's attention shall result in whatever sanctions may be appropriate.

Dated at Cleveland, Ohio this _____ day of December, 1987.

FRANK J. BATTISTI
Chief Judge

ORDER OF THE UNITED STATES DISTRICT COURT

(Filed July 23, 1985)

C85-752

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

UNITED STATES OF AMERICA,
Plaintiff,

vs.

GRISWOLD INSTITUTE, INC., *et al.*,
Defendants.

ORDER

BATTISTI, *C.J.*

Defendants having been notified, no facts being controverted, and pursuant to Rule 65(a) of the Federal Rules of Civil Procedure and Title 26, Section 7042(a), United States Code, the Court grants plaintiff United States' motion for preliminary injunction.

Accordingly, IT IS HEREBY ORDERED that the defendants are enjoined from:

1. Failing to timely pay the corporate defendants' future withholding and Federal Insurance Contributions Act (FICA) tax liabilities;

2. Transferring any money or property to any other entity for the purpose of having that entity pay net salaries or net wages of any of the employees of Griswold Institute, Inc. or Freedom Academy;

3. Assigning any property or rights to property or making any disbursements for any purpose after the date of the order granting injunctive relief until the amounts required to be withheld from the wages, salaries, or other compensation of the corporate defendants' employees after such date (whether the wages, salaries or other compensation are paid by the corporate defendants or any other entity) are first paid to the Internal Revenue Service.

IT IS FURTHER ORDERED that:

1. Norbert G. Dennerll, Jr., Beverly Dennerll and every other person authorized to sign checks on any account from which employees or creditors of Griswold Institute, Inc. or Freedom Academy are paid, to file a statement with the Special Procedures Function of the Internal Revenue Service in Cleveland, Ohio to effect that: (a) they have read the order of the Court granting injunctive relief sought by the United States; (b) that they will personally determine each pay period that the withheld FICA and withholding tax liabilities for every pay period after the date of the order granting the injunction have been fully paid to the Internal Revenue Service by certified or cashier's check prior to signing checks for the disbursement of any other funds; and (c) that they will not assign or transfer any property or rights to property of Griswold Institute, Inc. or Freedom Academy after the date of this Court's order unless all employment taxes of both corporate defendants for every pay period after the order of injunction have been paid;

2. In the event any of these defendants, their officers, agents, servants or employees and any persons acting in concert with them fail to comply with this Court's order, the United States may enter upon the property of any of the defendants and seize and sell the property of the corporate defendants to insure compliance with the Internal Revenue laws and prevent further pyramiding of the corporate defendants' tax liabilities.

/s/ FRANK J. BATTISTI
Chief Judge

ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

(Filed December 13, 1988)

[NOT RECOMMENDED FOR FULL-TEXT PUBLICATION]

No. 88-3022

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

vs.

GRISWOLD INSTITUTE, INC., *et al.*,
Defendants-Appellants.

ORDER

BEFORE: MERRITT and GUY, *Circuit Judges;* and JOHNSTONE, *District Judge**.

This cause having come on to be heard upon the record, the briefs and the oral argument of the parties, and upon due consideration thereof,

IT IS ORDERED that the judgment of the district court be, and it hereby is, AFFIRMED upon the opinion of the district court.

ENTERED BY ORDER OF THE COURT
LEONARD GREEN, *Clerk*

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* The Honorable Edward H. Johnstone, Chief Judge of the United States District Court for the Western District of Kentucky, sitting by designation.

ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT DENYING PETITION FOR REHEARING

(Filed January 27, 1989)

No. 88-3022

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

GRISWOLD INSTITUTE, INC., *et al.*,
Defendants-Appellants.

ORDER

BEFORE: MERRITT and GUY, *Circuit Judges;* and JOHNSTONE*, *Chief Judge,* United States District Court.

The Court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this Court, and no judge of this Court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original hearing panel.

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* Hon. Edward H. Johnstone sitting by designation from the Western District of Kentucky.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

ENTERED BY ORDER OF THE COURT

/s/ LEONARD GREEN
Clerk

STATUTE INVOLVED

28 U.S.C.S. §1292

§1292. **Interlocutory decisions**

(a) Except as provided in subjections (c) and (d) of this section, the courts of appeals shall have jurisdiction of appeals from:

(1) Interlocutory orders of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, or of the judges thereof, granting, continuing, modifying, refusing or dissolving injunctions, or refusing to dissolve or modify injunctions, except where a direct review may be had in the Supreme Court;

(2) Interlocutory orders appointing receivers, or refusing orders to wind up receiverships or to take steps to accomplish the purposes thereof, such as directing sales or other disposals of property;

(3) Interlocutory decrees of such district courts or the judges thereof determining the rights and liabilities of the parties to admiralty cases in which appeals from final decrees are allowed.

(b) When a district judge, in making in a civil action an order not otherwise appealable under this section, shall be of the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation, he shall so state in writing in such order. The Court of Appeals which would have jurisdiction of an appeal of such action may thereupon, in its discretion, permit an appeal to be taken from such order, if application is made to it within ten days after

the entry of the order: Provided, however, That application for an appeal hereunder shall not stay proceedings in the district court unless the district judge or the Court of Appeals or a judge thereof shall so order.

(c) The United States Court of Appeals for the Federal Circuit shall have exclusive jurisdiction—

> (1) of an appeal from an interlocutory order or decree described in subsection (a) or (b) of this section in any case over which the court would have jurisdiction of an appeal under section 1295 of this title [28 USCS §1295]; and
>
> (2) of an appeal from a judgment in a civil action for patent infringement which would otherwise be appealable to the United States Court of Appeals for the Federal Circuit and is final except for an accounting.

(d)(1) When the chief judge of the Court of International Trade issues an order under the provisions of section 256(b) of this title [28 USCS §256(b)], or when any judge of the Court of International Trade, in issuing any other interlocutory order, includes in the order a statement that a controlling question of law is involved with respect to which there is a substantial ground for difference of opinion, and that an immediate appeal from that order may materially advance the ultimate termination of the litigation, the United States Court of Appeals for the Federal Circuit may, in its discretion, permit an appeal to be taken from such order, if application is made to that Court within ten days after the entry of such order.

(2) When any judge of the United States Claims Court, in issuing an interlocutory order, includes in the order a statement that a controlling question of law is involved with respect to which there is a substantial ground for

difference of opinion and that an immediate appeal from that order may materially advance the ultimate termination of the litigation, the United States Court of Appeals for the Federal Circuit may, in its discretion, permit an appeal to be taken from such order, if application is made to that Court within ten days after the entry of such order.

(3) Neither the application for nor the granting of an appeal under this subsection shall stay proceedings in the Court of International Trade or in the Claims Court, as the case may be, unless a stay is ordered by a judge of the Court of International Trade or of the Claims Court or by the United States Court of Appeals for the Federal Circuit or a judge of that court.